

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

MOODY EXCAVATING LLC)	
)	
_____)	CASE NO.
)	2021-00256
ALLEGED VIOLATION OF UNDERGROUND)	
FACILITY DAMAGE PREVENTION ACT)	

ORDER

The Commission’s Division of Inspection (DOI) initiated this case against Moody Excavating LLC (Moody) on June 24, 2021, for alleged violations of KRS 367.4911(1)(a) and KRS 367.4911(2) of the Underground Facility Damage Prevention Act¹ (Act). Specifically, DOI alleged that on September 23, 2019, at approximately 2:22 p.m. at 625 Beaumont Avenue, Lexington, Kentucky 40502, Moody violated KRS 367.4911(1)(a) and KRS 367.4911(2) by “excavating an area without a locate ticket [and] [w]hile digging with mechanized equipment [...] str[iking] a plastic one inch natural gas service line[.]”² DOI also alleged that Moody caused damage to the plastic gas line.³ The Commission filed its proof of service upon Moody on July 19, 2021.⁴ The Commission issued an Order and

¹ KRS 367.4901 through KRS 367.4917.

² Opening Order (Ky. PSC June 24, 2021), Appendix, Attachment 1.

³ Opening Order (Ky. PSC June 24, 2021), Appendix, Attachment 1.

⁴ Notice of Filing (Ky. PSC July 19, 2021).

Notice of Hearing on July 22, 2021, scheduling this matter for a hearing on August 19, 2021.⁵

A hearing was held before the Commission on August 19, 2021, at its offices at 211 Sower Boulevard, Frankfort, Kentucky, concerning the allegations that Moody violated KRS 367.4911(1)(a) and KRS 367.4911(2). Neither Moody nor counsel on its behalf appeared at the August 19, 2021 hearing. At the conclusion of the August 19, 2021 hearing, the Commission requested that DOI file a post-hearing brief as to whether there could be simultaneous violations of KRS 367.4911(1)(a) and KRS 367.4911(2). DOI filed its post-hearing brief on August 26, 2021.⁶

TESTIMONY

The Commission heard the testimony of only one witness, Mr. Eric Tout (Mr. Tout), an investigator with DOI. Mr. Tout testified that he investigated the incident in this matter.⁷ Mr. Tout reviewed and identified his investigation report that was introduced into evidence as DOI Staff Exhibit 1.⁸ As outlined in his report, Mr. Tout testified that another company, Economy Home Improvements (EHI) called 811 to have any underground utility service lines marked at the property.⁹ The locate ticket was issued on August 26, 2019.¹⁰ The

⁵ Order and Notice of Hearing (Ky. PSC July 22, 2021).

⁶ Notice of Filing (Ky. PSC Aug. 26, 2021).

⁷ Hearing Video Transcript (HVT) of the Aug. 19, 2021 Hearing at 10:38:10 a.m.

⁸ HVT of the Aug. 19, 2021 Hearing at 10:39:08 a.m.; Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1.

⁹ HVT of the Aug. 19, 2021 Hearing at 10:39:55 a.m.; Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1.

¹⁰ HVT of the Aug. 19, 2021 Hearing at 10:40:15 a.m.; Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1, Attachment 3.

locate ticket expired on September 16, 2021.¹¹ The operator of an underground facility, Columbia Gas of Kentucky, Inc. (Columbia Kentucky), reported that Moody damaged their gas service line on September 23, 2021.¹² The underground facility contained natural gas at the time it was damaged.¹³ Mr. Tout reported that this was Moody's first violation of the Act.¹⁴

Mr. Tout testified that Moody argued that he was an employee of EHI, rather than an independent contractor.¹⁵ However, an EHI representative provided invoices submitted by Moody to EHI appearing to be more in the nature of subcontractor invoices, and thus not one of EHI's employees.¹⁶

LEGAL STANDARD

The version of KRS 367.4911(1)(a) in effect at the time of the September 23, 2019 incident provided:

Each excavator, or person responsible for an excavation, planning excavation or demolition work shall, not less than two (2) full working days nor more than ten (10) full working days prior to commencing work, notify each affected operator of the excavator's intended work and work schedule. Contacting the applicable protection notification centers shall satisfy this requirement.

¹¹ HVT of the Aug. 19, 2021 Hearing at 10:40:23 a.m.

¹² HVT of the Aug. 19, 2021 Hearing at 10:40:38 a.m.; Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1, Attachment 1.

¹³ HVT of the Aug. 19, 2021 Hearing at 10:40:48 a.m.

¹⁴ HVT of the Aug. 19, 2021 Hearing at 10:41:52 a.m.

¹⁵ HVT of the Aug. 19, 2021 Hearing at 10:42:20 a.m.

¹⁶ HVT of the Aug. 19, 2021 Hearing at 10:42:45 a.m.

Further, KRS 367.4911(2) provides that “[l]ocate requests are valid for twenty-one (21) calendar days from the day of the initial request.”

Any violation of the Act may subject the offending excavator to a civil penalty of \$250 for the first offense.¹⁷ In addition, an excavator may be subject to a \$1,000 civil penalty if the offense causes any damage to an underground facility containing “flammable, toxic, corrosive, or hazardous material[.]”¹⁸

DISCUSSION AND FINDINGS

The testimony presented at the hearing as well as the exhibits filed in the record establish that that locate request ticket had expired as of the time that Moody began excavation on September 23, 2019.¹⁹ Moody acknowledged in discussions with DOI staff that EHI requested a locate ticket.²⁰ Moody did not request a locate ticket in accordance with the Act. As KRS 367.4907 states, “[e]very person who engages in nonemergency [...] excavation shall conform to KRS 367.4905 to 367.4917.”

At the time the damage occurred on September 23, 2019, Moody was an excavator as defined by KRS 367.4903(4).²¹ Further, Moody caused damage to a natural gas service line by means of excavation as defined by KRS 367.4903(2) and (6).²² The natural gas service line was an underground facility owned and operated by Columbia

¹⁷ KRS 367.4917(1).

¹⁸ KRS 367.4917(4).

¹⁹ Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1.

²⁰ Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1.

²¹ Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1.

²² Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1.

Kentucky to serve the public.²³ The service line contained natural gas at the time it was damaged during Moody's excavation.²⁴

Moody failed to call the Kentucky Contact Center (811) to obtain information about the approximate location of the damaged natural gas line not less than two nor more than ten full working days prior to commencing work as required by KRS 367.4911(1)(a).²⁵ The locate request ticket had expired by the time that Moody began excavation.²⁶ The Act imposed a duty upon Moody to have obtained a new, valid locate request ticket prior to the time of his excavation.

Moody's excavation work was not emergency work within the scope of KRS 367.4907 or the definition of "Emergency" as defined in KRS 367.4903(7), and no exception to the call requirement is applicable to this case.

There are no known mitigating factors which would merit the imposition of a civil penalty less than the maximum provided by law. This violation is Moody's first violation of the Act.²⁷

CONCLUSIONS OF LAW

1. Moody violated KRS 367.367.4911(1)(a) and KRS 367.4911(2) by "excavating an area without a locate ticket [and] [w]hile digging with mechanized

²³ Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1.

²⁴ Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1.

²⁵ Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1.

²⁶ Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1, Attachment 3.

²⁷ Notice of Filing (Ky. PSC Sept. 15, 2021), DOI Staff Exhibit 1.

equipment [...] str[iking] a plastic one inch natural gas service line” as alleged in the Opening Order.²⁸

2. As a consequence, Moody is subject to a civil penalty of \$1,250 for this violation of the Act by operation of KRS 367.4917(1) and KRS 367.4914(4).

IT IS THEREFORE ORDERED that:

1. Moody Excavating LLC is assessed a civil penalty of \$1,250 for violations of KRS 367.367.4911(1)(a) and KRS 367.4911(2).

2. Moody Excavating LLC shall pay \$1,250 within 30 days of the date of this Order by cashier’s check or money order payable to the Kentucky State Treasurer and mailed or delivered to the office of the Kentucky Public Service Commission at 211 Sower Boulevard, Frankfort, Kentucky 40602.

3. Record of payment of the civil penalty assessed in this Order shall be filed in the post-case correspondence file of this proceeding.

4. This case is closed and removed from the Commission’s docket.

THIS IS A FINAL AND APPEALABLE ORDER OF THE PUBLIC SERVICE COMMISSION.

An application for a rehearing may be filed with the Commission within 20 days after service of this Order as provided by KRS 278.400. Any appeal of this Order must be filed with the Franklin Circuit Court within 30 days after service of this Order or within 20 days after an application for rehearing has been denied by failure of the Commission to act or, within 20 days after service of the final Order, as set out in KRS 278.410.

²⁸ Opening Order (Ky. PSC June 24, 2021), Appendix, Attachment 1.

PUBLIC SERVICE COMMISSION


Chairman

Vice Chairman


Commissioner



ATTEST:


Executive Director

Thomas A Moody
Registered Agent
Moody Excavating LLC
103 Summit Drive
Georgetown, KENTUCKY 40324